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SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	CASE NO. V1300CR201080049 DIVISION PTB HON. WARREN R. DARROW **DEFENDANT JAMES ARTHUR RAY'S REPLY IN SUPPORT OF MIL (4) TO EXCLUDE (A) MR. RAY'S POST-SWEAT LODGE CONDUCT AND (B) ACTS OR OMISSIONS OF JRI EMPLOYEES AND VOLUNTEERS**

I. INTRODUCTION

The State's Response fails to establish *any* relevance in the two categories of evidence at issue in this motion: (A) evidence of Mr. Ray's conduct *after* the sweat lodge ceremonies in 2003-2009; (B) evidence of acts or omissions of JRI employees or volunteers. Moreover, the State's Response scarcely denies the serious and unfair prejudice that evidence within these categories would cause Mr. Ray. The evidence the State wishes to introduce would serve only to

portray Mr. Ray in an unflattering light and inflame the jury. The evidence must be excluded pursuant to Arizona Rules of Evidence 402, 403, and 404.

II. ARGUMENT

A. Mr. Ray's statements and actions after sweat lodge ceremonies are irrelevant and unfairly prejudicial and must be excluded.

The State argues that Mr. Ray's statements and actions after sweat lodge ceremonies concluded—in 2009 and in prior years—are relevant to show his mental state and to "complete the story." Both theories are unworkable.

1. Statements and actions after the 2009 sweat lodge.

As the Court noted at the *Terrazas* hearing, the State's attempt to introduce evidence of how Mr. Ray "reacts after an incident" is tantamount to "talking about some trait of callousness." Reporter's Transcript ("RT"), Nov. 10, 2010, at 23:5-7. That "would clearly not be admissible" in light of Rule 403. *Id.* The State agrees in its Response that it may not "admit the evidence to prove Defendant has a callous character or that he acted callously." Response 2:22–23. But the evidence of Mr. Ray's conduct after the 2009 sweat lodge serves no other purpose.

The State asserts that "Defendant's conduct following *all* of the sweat lodge ceremonies is clearly relevant to prove the requisite mental state for the crime of manslaughter." Response at 3:9–10 (emphasis added). But the State never explains how Mr. Ray's conduct ***after*** the 2009 sweat lodge could possibly prove his knowledge or mental state ***during*** the sweat lodge ceremony, when he allegedly committed the charged crimes. Evidence that Mr. Ray did not render medical aid to participants, or returned to his room after the ceremony to take a shower, simply has no bearing on what he knew or did not know before and during the ceremony. The State does not even attempt to argue otherwise. Nor does the State retreat from its statement at the *Terrazas* hearing in this case that how Mr. Ray "reacts afterwards is not what's relevant." *See* Motion at 2:23–3:2 (quoting RT, 23:16–21).

The State's alternate argument, that Mr. Ray's conduct after the 2009 sweat lodge is necessary to "complete the story," fares no better. The State fails to explain how Mr. Ray's conduct *after* the crime was allegedly committed "completes the story," or what story it

supposedly completes. The State's only explanation is its vague statement that "the story did not end the minute the Defendant exited the sweat lodge or when he left the scene." Response at 6:13–14.

The case law the State relies upon for its "complete story" argument is entirely inapposite. The State cites *State v. Myers*, 117 Ariz. 79, 85-86 (1977), for the proposition that evidence of *other crimes* can be admitted when it is "so interrelated with the crime with which the defendant is presently charged that the jury cannot have a full understanding of the circumstances" without it. Response at 6:25–26. This citation is misplaced. As an initial matter, *Myers* is factually distinguishable: it involved a crime spree, and "[t]he facts of the several crimes which appellant allegedly committed in the same evening" were so intertwined that it was "almost impossible to separate evidence relating to the robbery and shooting . . . from evidence relating to the [other] crimes."[1] More fundamentally, the "complete story test" does not enlarge the category of relevant evidence, but rather stands for the proposition that evidence that is "directly probative" of the charged crime may be admissible even though it involves prior bad acts. *State v. Allen*, 111 Ariz. 546, 548 (1975). Here, the State has failed to identify *any* probative value at all in Mr. Ray's conduct after the 2009 sweat lodge. The post-sweat lodge evidence emphatically does *not* "complete the story" *of the charged crimes* simply because it fits into a narrative of Mr. Ray's personality that the State would like to tell. *Compare, e.g., State v. Fulminante*, 193 Ariz. 485, 504 (1999) (noting, regarding testimony on the arrangement of murder victim's clothes, "[i]t is difficult to see the relevance of this evidence to the charges against Defendant or to ascertain just what story was being completed.").

[1] In particular, the evidence of the earlier crimes corroborated the testimony of a key witness who testified that he was with appellant during the crimes. *Id.* at 85–86. The State also relies on *State v. Lamar,* 144 Ariz. 490, 497 (1984), which involved a riot at a local high school that began when an expelled student returned to campus without permission. Evidence of the circumstances of the student's expulsion was relevant to explain, *inter alia*, "why the school officials reacted as they did" when he returned to the campus without authorization. *Id.* The State identifies no case in which conduct *after* a charged crime was relevant to "complete the story" of the charged crime.

2. Statements and actions after the 2003–2008 sweat lodges

The State asserts that the events following sweat lodge ceremonies in prior years are relevant to prove that Mr. Ray "knew adverse medical effects could occur by participation in the ceremony." Response at 5:6–11. As one example, the State claims that Mr. Ray's failure to "determine why" Mr. Pfankuch went to the hospital in 2005 is "clearly . . . admissible to prove the requisite mental state of 'reckless.'" Response at 5:14–24. But the State's allegations compel the opposite conclusion: if Mr. Ray did *not* know Mr. Pfankuch's medical condition, the evidence has no bearing on whether he was aware of and consciously disregarded an unjustifiable risk of death. Similarly, evidence that Mr. Ray failed to "follow up" with participants regarding their medical condition, or that Mr. Ray left the premises after sweat lodge ceremonies, shows that Mr. Ray did ***not*** have the knowledge the State alleges. *See* Motion at 1–2. The State is not permitted to introduce inflammatory evidence that directly refutes its own theory of admissibility.

Moreover, the prejudicial effect of the post-sweat lodge evidence, and the need to exclude it pursuant to Rules 403 and 404, is clear. Indeed, the State's Response highlights the very character attack the State seeks to achieve through such evidence. "***What reasonable person***," the State asks, "takes another individual, places them into a situation where, as a result of being in the situation, the individual is transported via ambulance to a hospital, and ***then does not make any effort to determine why***?" This is a blatant (indeed, explicit) attempt to denigrate Mr. Ray's character. The State seeks to leverage the allegation that Mr. Ray did not ascertain Mr. Pfankuch's medical information into an inference that Mr. Ray is a callous person who would behave callously in other situations. Arizona's rules of evidence flatly prohibit this tack.

B. The acts or omissions of JRI employees and volunteers are irrelevant and unfairly prejudicial and must be excluded.

Mr. Ray has moved to exclude evidence of the acts or omissions of JRI employees or volunteers on the ground that such evidence is not relevant and would unfairly prejudice Mr. Ray's defense. The State devotes most of its Response to this argument to the proposition that, "to the extent that they are relevant," the acts of JRI staff and volunteers would not be

inadmissible hearsay. Response at 8:3–26. But that is not the question. And the passing attention the State does give to the relevance of such evidence is unavailing.

First, the State asserts, without any elaboration, that the State must be able to introduce evidence of the actions and statements of JRI staff and volunteers in order to "present the complete story" to the jury. Response at 7:8–9. Again, the State stretches this phrase beyond its legal breaking point, and without providing any details on *how* these apparently irrelevant acts of others are necessary to proving that *Mr. Ray* committed the charged crimes. Second, the State posits that a Dream Team member's encouragement to a participant to re-enter the sweat lodge "goes directly to Defendant's knowledge and mental state" because it "occurred in the presence of Defendant." Response at 7:16–19. That is wrong. The "knowledge and mental state" relevant in this case is whether Mr. Ray was aware of the risk of the deaths that occurred. Third, the Response contends that JRI staff "refused to call 911 without first checking with Mr. Ray," and that this is "extremely relevant to show the jury the extent of control Defendant exercised over the event." Response at 7:19–20. But the State does not explain how this alleged "control" is relevant to the charged crimes, let alone provide any basis for inferring that the actions of other individuals shed light on Mr. Ray's "control."

III. CONCLUSION

The State's nine-page Response fails to identify any relevance in (A) Mr. Ray's post-sweat lodge conduct or (B) the acts or omissions of JRI staff or employees. Evidence in these categories would unfairly prejudice Mr. Ray's defense by denigrating his character and inflaming the jury. The balancing inquiry under Rule 403 therefore yields a straightforward result: the evidence must be excluded.

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